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IN THE

Supreme Court of the United States

October Term, 1997

LOVILIA COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

WESLEY HARVEY and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL MINING ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC., NATIONAL WORKERS COMPENSATION REINSURANCE POOL AND ALLIANCE OF AMERICAN INSURERS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Principles of finality are crucial to ensuring that the American legal system serves as a disciplined process to fairly adjudicate rights and determine facts. Notwithstanding this Court's clear instruction that there is no basis to override the doctrine of res judicata in the absence of a Congressional mandate, principles of finality are rarely recognized and protected in federal black lung cases. The Third, Fourth, Sixth and Eighth Circuits eschew these principles by condoning a perpetual right to have claims readjudicated. The Seventh and Tenth Circuits permit the reopening of a claim under more limited circumstances that accord some preclusive effect to the prior adjudication. The disagreement among the circuits creates grave uncertainty in this area of the law and the refusal of the circuits to honor ordinary principles of finality in federal black lung cases imposes upon Amicis' members not only serious procedural unfairness, but also unreasonable and unexpected financial liability.

The National Mining Association ("NMA") is a trade association representing coal mine operators who produce sixty percent of the nation's coal. NMA's membership includes coal mining companies of all sizes, as well as other key segments of the industry, such as coal brokers, equipment suppliers, coal transporters, and electric utilities. Coal producers are responsible for the payment of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, as individual coal mine operator defendants, 30 U.S.C. §§ 932-933, and as mandatory

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[1] Pursuant to Rule 37.2, written consents to this brief's filing from counsel of record for all parties to these proceedings are being filed with the Clerk of the Court with this brief. Counsel for Amici has consulted with counsel for Petitioners in the preparation of this brief. Other than Amici and their members, no person or entity made a monetary contribution to the preparation or submission of the brief.

payors of an excise tax on coal production paid into the Black Lung Disability Trust Fund ("Trust Fund"), 26 U.S.C. § 4121. NMA and its members are committed to preserving a viable and just black lung compensation system.

The National Workers Compensation Reinsurance Pool ("NWCRP") is a contractual reinsurance pooling mechanism among participating workers' compensation insurers. The NWCRP affords such insurers an option for complying with state insurance plan requirements by sharing in the operating results arising out of certain policies written pursuant to such insurance plans.

The National Council on Compensation Insurance, Inc. ("NCCI") is the nation's largest workers' compensation and health care information corporation. As Administrator of the NWCRP, under the direction of the NWCRP Board of Governors, NCCI is responsible for the Pool's financial operations as well as the rules and procedures that govern those transactions.

The Alliance of American Insurers ("AAI") is a national trade association representing approximately 260 property and casualty insurers. Alliance member companies write over twenty percent of the workers' compensation insurance provided by private insurers under state workers' compensation programs.

The American Insurance Association ("AIA") is a national trade association of more than 300 property and casualty insurance companies that write a substantial share of workers' compensation insurance throughout the nation, including coverage under the Black Lung Benefits Act and Longshore and Harbor Workers' Compensation Act. Members provide black lung coverage through the voluntary market and residual markets, the latter of which is reinsured through the NWCRP,

administered by NCCI. AIA has a longstanding interest in and support for the workers' compensation system and is dedicated to ensuring that workers' compensation programs provide a fair level of income support and necessary medical care for injured workers at an affordable price for employers.

Amicis' members are all part of the intricate financial mechanism that has ensured the payment of billions of dollars to claimants since 1972 through insurance and self-insurance mechanisms and in payments by the Trust Fund. Coal operators must secure federal black lung compensation liability by purchasing workers' compensation insurance or by qualifying as a self-insurer. 30 U.S.C. § 933. Both the self-insurance and commercial insurance arrangements involve careful advance financial planning. This planning necessitates the capability to predict with accuracy the frequency of claims within a given year and the likelihood of their approval. The circuits' abandonment of ordinary principles of finality deprives Amicis' members of the capability to assume a correct approval rate, and thereby prevents them from setting a sufficient charge, or setting aside enough money, to pay claims. Since 1973, the workers' compensation insurance industry has guaranteed the availability of workers' compensation insurance covering federal claims to all mine operators doing business in states that permit the sale of commercial workers' compensation insurance coverage. The questions presented in the Petition as to the finality accorded prior black lung claim adjudications pose enormous economic consequences for Amicis' members.

ARGUMENT

I. REVIEW IS WARRANTED TO CLARIFY THE APPROPRIATE STANDARD FOR APPLYING THE PRINCIPLES OF FINALITY IN BLACK LUNG CLAIM ADJUDICATIONS

A. The Disagreement Among the Circuits Creates Grave Uncertainty for Everyone Involved in the Black Lung Program

This Court has stressed repeatedly that the ordinary principles of finality embodied in the doctrine of res judicata are rules of "fundamental and substantial justice" which must be enforced by the courts. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Notwithstanding this well-established principle, the circuits have struggled with the notion of when, if ever, there is an end to a black lung claim adjudication.

The Department of Labor's regulations allow a miner whose prior claim for black lung benefits has been denied to file a subsequent, or "duplicate," claim and receive benefits if it is determined that "there has been a material change in conditions" since the prior adjudication denying the claim. 20 C.F.R. § 725.309(d) (1997). Because "[t]he regulations fail to define what a miner must prove to demonstrate such a material change," *Wyoming Fuel Co. v. Director, OWCP*, 90 F.3d 1502, 1508 (10th Cir. 1996), the courts have been left to "determine the proper standard by which to measure the existence of a 'material change.'" *Sharondale Corp. v. Ross*, 42 F.3d 993, 997 (6th Cir. 1994). Predictably, the resulting disparity in standards has created untoward uncertainty about when a black lung claim is considered final and settled among the parties.

The Petition (at 15-23) fully explicates the substantial disagreement among the circuits as to the proper application of the salutory principle of res judicata in black lung claim adjudications. It suffices to note here that the decision below, Pet. App. at 11, 12, 19, as well as those of the Third, Fourth and Sixth Circuits, countenance the perpetual reopening of denied claims by allowing additional evidence and reweighing of old evidence to support a duplicate claim. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 318 (3d Cir. 1995); *Lisa Lee Mines v. Director, OWCP*, 86 F.2d 1358, 1362-63 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 763 (1997); *Sharondale Corp.*, 42 F.3d at 998.[2] The Seventh and Tenth Circuits draw upon more traditional notions of finality and claim preclusion by requiring no less than direct proof of a material change in condition, *Sahara Coal Co. v. OWCP*, 946 F.2d 554, 556 (7th Cir. 1991), or proof of each element of entitlement, *Wyoming Fuel Co.*, 90 F.3d at 1510-11, to support a duplicate claim.

The preclusive effect accorded a prior benefit adjudication should not turn simply upon the geographical location of the mine where the claimant was last employed. However, that is precisely the effect of the disparate approaches among the circuits in their readjudication of federal black lung claims. The Court should grant review to eliminate this untoward uncertainty.

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[2] The decision below explains that the so-called "one-element" standard adopted by these circuits compels an inference that a material change has occurred if new evidence establishes at least one of the elements of entitlement ***previously adjudicated against the miner***. Pet. App. at 11, 12. This inference then requires a reweighing of all the evidence — including the evidence predating the prior denial — to determine whether it supports an entitlement to benefits. *Id.* at 12.

B. The Decision Below Conflicts Directly With Controlling Precedent

The rigorous adherence to the doctrine of res judicata is a well-established part of this Court's case law. *Federated Dep't Stores, Inc.*, 452 U.S. at 400. In *Pittston Coal Group v. Sebben*, this Court found no reason to temper the rule for black lung claim adjudications. 488 U.S. 105, 122 (1988). In its countenance of repeated readjudications of a claim, the decision below seriously undermines what this Court established in *Pittston*, and flatly conflicts with this Court's consistent instruction that no principle of law or equity sanction the displacement of this fundamental doctrine. *See Federated Dep't Stores, Inc.*, 452 U.S. at 401; *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946).

Here, the Eighth Circuit side-stepped the doctrine of res judicata by characterizing the claimant's repeated attempts to relitigate the previous denials as a "new" claim to benefits based on a change in conditions. Pet. App. at 8, 9, *See also Lisa Lee Mines*, 86 F.3d at 1362 (nothing bars claimants from refiling claims seriatim because the claims are not the same); *Labelle Processing Co.*, 72 F.3d at 314 (claimant may refile a duplicate claim asserting entitlement because of changes subsequent to the prior adjudication). But this deceptively simple characterization of duplicate claims does not fully disclose how the "one-element" standard actually works.

First of all, the "one-element" standard does not demand that the claimant actually show a material change in his condition or, for that matter, any change at all. Rather, the claimant need only adduce new evidence to "establish[ ] at least one of the three elements of entitlement previously adjudicated against [him]." Pet. App. at 11. *Accord Lisa Lee Mines*, 86 F.3d at 1362. And, once the claimant establishes one element

of entitlement with new evidence, the claim is reopened to reevaluate whether all the evidence — including old evidence — establishes the remaining elements of entitlement. Pet. App. at 12, 18.

If, as the adherents to the "one-element" standard assert, the reopening of a prior benefit adjudication through a duplicate claim is truly a new claim, rather than an attempt to relitigate earlier claims, one would expect the standard to demand, at a minimum, direct proof that a material change in condition has actually occurred since the denial of the earlier claim. But the standard makes no such demand. Instead, it *presumes* a change on the basis of any additional evidence of a claimant's condition subsequent to the earlier denial that shows merely one of the elements of entitlement. Thus, a claimant may reopen prior adjudications repeatedly through duplicate claims and receive benefits, "notwithstanding that his condition has not changed at all," *Lisa Lee Mines*, 86 F.3d at 1366 (Niemeyer, J., dissenting), simply because additional evidence "might show merely that the original denial was wrong." *Sahara Coal Co.*, 946 F.2d at 566. Such a result not only offends, but eviscerates the core principles of res judicata.

The standard adopted below improperly invites perpetual refilings and readjudications of a claim until the claimant "finally gets it right," *Pittston Coal Group*, 488 U.S. at 122, by finding a judge who disagrees with the prior determination as to the strength of the evidence. The only bar would be a claimant's lack of persistence. This Court has already instructed that "[t]his is not the way the law works." *Id.* To indulge the contrary view, as did the court below, would result in the very mischief — confusion and uncertainty — which is "the very purpose of the doctrine of res judicata to avert." *Reed v. Allen*, 286 U.S. 191, 201 (1932). This manifest disregard of established principles warrants review.

II THE QUESTIONS PRESENTED IN THE PETITION HAVE SUBSTANTIAL IMPLICATIONS FOR THE BLACK LUNG BENEFITS PROGRAM

A. The Departure From Ordinary Principles of Finality Imposes Unfair Burdens Upon Coal Operators and Their Insurers

The principles of finality normally accorded prior adjudications ensure that everyone knows when a claim is considered final and settled among the parties. The departure from these principles, here, as well as in the circuits where most claims arise, imposes a unique unfair burden on coal operators and their insurers. Most refilers last worked in the mines many years ago. Such refilers' benefits and claim costs were self-insured by coal companies or insured under old insuring agreements. The cost of those agreements was based upon expectations that the ordinary rules of finality would apply. Such agreements are not funded for the repeated costs of relitigation.[3] Nor are such agreements funded for extra awards made to persistent refilers. The effective waiver of res judicata and claim preclusion in black lung claims imposes substantial costs on self-insured coal operators and coal operator insurers — costs that were not anticipated and cannot be recovered.

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[3] A recent survey by actuaries of total average industry defense costs showed that the average total defense cost per actively defended claim through the Benefits Review Board level was $6,069. Milliman & Robertson, Inc., *Cost Analysis of Federal Black Lung Act Regulations Proposed on January 22, 1997*, fig. 8, at 24 (Aug. 21, 1997) [hereinafter M&R, Inc., *Cost Analysis*] (app. 5 to Comments of the National Mining Association, American Insurance Association, National Council on Compensation Insurance, National Workers Compensation Reinsurance Pool, Alliance of American Insurers, and American Iron and Steel Institute, filed with United States Department of Labor's Employment Standards Administration in response to Notice of Proposed Rulemaking, 62 Fed. Reg. 3338 (1997) and available as part of the Public Docket in that proceeding).

The invitation extended here to perpetually refile claims previously adjudicated is also unfair to claimants in that it creates an unreasonable expectation of ultimate award of benefits. Such expectations encourage claimants who may truly not be entitled to benefits to persist in refiling claims under the mistaken belief that the claim will ultimately be granted. Some may be granted through the sheer weight of the legal process. This will be unfair to defendants. However, many claims will be denied repeatedly. To encourage such unrealistic persistence in claimants, who are often elderly, is unfair and wrong.

B. The Perpetual Reopening of Claims Sanctioned By the Decision Below Will Cause Serious Economic Hardship For the Black Lung Program

The decision below not only creates legal uncertainty, it has the potential to generate serious economic disruption for the Black Lung Benefits Program. In the last 15 years, 67,419 new claims and 42,556 duplicate claims have been filed under the Black Lung Program.[4] Thus, almost 40% of this pending claim activity is comprised of refilings by miners who have already received at least one prior adjudication denying their claim.

A refiler from this substantial pool of duplicate claims would likely avoid the application of the ordinary rules of finality, particularly, if the refiling is subject to the reopening standards

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[4] Div. of Coal Mine Workers' Compensation, U.S. Dep't of Labor, MIS Report No. 11, *Primary Work Load for District Office: All Offices*, p.7 of 10 (Sept. 30, 1997) [hereinafter DOL MIS Report No. 11]. The Department apparently treats each refiling as a single event. Since there have been claimants with multiple refilings, such as Mr. Harvey, the Department's cumulative refiling number is larger than the actual number of people who have refiled.

adopted by the Third, Fourth, Sixth and Eighth Circuits. There is strong reason to believe those circuits' jurisprudence will control most of the refilings.[5]

The potential additional costs imposed by the exception to res judicata the circuits have carved-out for black lung claim adjudications is enormous. The projected lifetime cost of duplicate claims awarded or paid out since 1982 alone exceeds $1 billion.[6] This cost would double if only a few thousand more of the pending pool of refilers are awarded benefits under the circuits' qualification of the ordinary principles of finality. This enormous and unanticipated economic burden will not only fall directly upon coal operators and their insurers, but also upon the Trust Fund whose deficit now exceeds $5 billion. Employment Standards Admin., U.S. Dep't of Labor, *OWCP Annual Report to Congress FY 1996*, at 23 (1997).

This Court has long recognized that "'simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied." *Federated Dep't Stores, Inc.*, 452 U.S. at 401. The Court should review the Eighth Circuit's

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[5] *Shupe v. Director, OWCP*, 12 B.L.R. (MB) 1-200, 1-202 (Ben. Rev. Bd. 1989) (Board applies the law of the circuit in which the miner most recently performed coal mine employment). The Third, Fourth, Sixth and Eighth Circuits include the states historically with the most underground coal mines. More than 80% of the nation's underground coal production over the past 50 years has been mined in the states within these circuits.

[6] The projection is constructed information from the Department of Labor and industry actuaries. The Department reports that 2475 post-1982 refiled claims have been awarded benefits and are presently being paid. Another 1923 post-1982 refiled claims were awarded benefits but have since been retired. DOL MIS Report No. 11, p. 10 of 10. Thus, the total number of post-1982 refiled awards is 4398. The average lifetime payout of federal black lung benefits for a miner and dependants awarded to a 60 year old miner is $263,275. M&R, Inc. *Cost Analysis*, fig. 7, at 23. Therefore, the projected lifetime payout of historic post-1982 refiled awards is $1,157,883,450. All these costs are undiscounted.

rejection of the principles of res judicata to restore the evenhanded application of the black lung law and to prevent the serious economic injuries that — absent review — the disregard of these salutory principles will inflict upon the coal industry, their insurers and the Trust Fund.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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